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Supreme Court of the United States

OCTOBER TERM, 1964

No. 578

GEORGE ANGELET,

Petitioner,

against

HON. EDWARD M. FAY, as Warden of Green Haven State Prison, Stormville, New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT

Preliminary Statement

Petitioner George Angelet was convicted after a New York State court trial in 1951 of the crime of possession of narcotics with intent to sell. He is presently held in custody by the respondent Warden pursuant to that judgment of conviction. Relying on the decision of this Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), petitioner now seeks relief from his imprisonment by way of federal habeas corpus. He claims that his 1951 conviction was obtained by the use of evidence seized in violation of the Fourth and Fourteenth Amendments and argues that the *Mapp*

decision must be applied retroactively in a habeas corpus proceeding. The United States District Court for the Southern District of New York (PALMIERI, J.) denied the petitioner's application for a writ of habeas corpus on September 20, 1961 (R. 249); the United States Court of Appeals for the Second Circuit, sitting en banc, affirmed that denial by a vote of 7-2 on June 11, 1964 (R. 257). A writ of certiorari to the Court of Appeals for the Second Circuit was granted by this Court on October 12, 1964 (R. 283).

Opinions Below

The opinion of the District Court (R. 249-50) is unreported. The majority opinion of the Circuit Court, per MEDINA, J. (R. 257-71), is reported at 333 F. 2d 12; the dissent, per MARSHALL, J. (R. 271-81), is at 333 F. 2d 12, 21.

Jurisdiction

Petitioner has invoked the jurisdiction of the Court under 28 U.S.C. § 1254(1).

Question Presented

Would the interests of justice be served by a retroactive application of the exclusionary rule established by the decision in *Mapp* v. *Ohio* in view of (1) the strong reliance of the state courts and prosecutors upon the common law rule of admissibility and upon this Court's decision in *Wolf* v. *Colorado* expressly permitting the use of such evidence; (2) the adverse effects a retroactive holding would have upon the orderly administration of criminal justice; and (3) the fact that no purpose of the exclusionary rule would be furthered by its application to past convictions?

Constitutional and Statutory Provisions Involved

Constitution of the United States:

Amendment IV—The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV, Section 1— . . . No State shall make or enforce any law which shall abridge the privilege or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 28, United States Code:

§ 2241. Power to grant writ.

(a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. . . .

• • •

(c) The writ of habeas corpus shall not extend to a prisoner unless . . . .

• • •

(3) He is in custody in violation of the Constitution or laws or treaties of the United States . . .

§ 2243. Issuance of writ; return; hearing; decision.

A court, justice or judge entertaining an application for a writ of habeas corpus shall forthwith award the writ or issue an order directing the respondent

to show cause why the writ should not be granted, unless it appears from the application that the applicant or person detained is not entitled thereto.

• • •

The court shall summarily hear and determine the facts, and dispose of the matter as law and justice require.

Statement of the Case

The State Trial and Conviction

Petitioner George Angelet was tried before Judge Jonah GOLDSTEIN and a jury in the former Court of General Sessions, New York County,[1] on a two count indictment charging possession of narcotics with intent to sell (N. Y. Penal Law, § 1751 subd. 2), and unlawful possession of narcotics (N. Y. Penal Law, § 1751 subd. 3). The trial lasted from January 30, 1951 to February 2, 1951.

It was admitted from the outset of the trial that Angelet was guilty of the possession charge (opening statement of counsel, R. 26). His defense to the charge of possession with intent to sell was that he was a user, rather than a seller of narcotics (statement of counsel, R. 26-29, 83; testimony of Angelet, R. 111, 116). The People's presentation of evidence was directed toward showing that when Angelet was arrested on December 21, 1950, he had in his possession over two ounces of heroin, as well as milk sugar, empty capsules, and other paraphernalia commonly used by sellers of narcotics.

Detective Thomas W. O'Brien, who for four years had been attached to the Narcotics Squad of the New York

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[1] Now incorporated into the Supreme Court, New York County (N. Y. Laws of 1962, Ch. 692).

City Police Department, testified that he went to Angelet's apartment with Detective Mandel Schein at about 12:15 p.m. on December 21, 1950 (R. 30, 31). According to Detective O'Brien, he and Detective Schein entered the apartment through the open front door, walked a few steps into the apartment, and observed Angelet seated at a kitchen table (R. 31-32). They immediately told him that they had information that he had narcotics and a gun in the apartment (R. 32). Angelet denied this (R. 32-33), but agreed to accompany the detectives to the bedroom (R. 33).

When the detectives said they intended to search the bedroom, Angelet replied that they were wasting their time (R. 33), but when Detective O'Brien found a quantity of loose money in the top dresser drawer, he suggested that the detective might "take some and get out of here, and save me some trouble" (R. 33-34). Detective O'Brien continued to search through the dresser, however, and found a number of cellophane envelopes (R. 34), a quantity of empty capsules (R. 35), a stapling machine (R. 36), a box of staples (R. 36), and a scale (R. 36). A Federal Narcotics Agent, Benjamin Fitzgerald, who had been called by Detective Schein (R. 38), found four packages containing a white powder (R. 39-40).

The cellophone envelopes, the empty capsules, the stapling machine, the staples and the scale were all introduced at the trial after Angelet's counsel had specifically stated "no objection" when they were offered in evidence by the People (R. 34, 36, 37, 38). Detective O'Brien testified that, in his experience, these items were commonly used by sellers of narcotics in the course of their business (R. 52). The white powder contained in three of the envelopes found by Agent Fitzgerald was subsequently identified by a chemist as being a thirty per cent heroin alkaloid having a total avoirdupois weight of two and seven-thirty-

seconds of an ounce (R. 78-80)[2]. The chemist, Samuel Tabor, also testified that the fourth package contained 18 capsules and was a mixture of powder and cocaine in undetermined amounts (R. 80-83). Angelet's counsel stated expressly that he had "no objection" to the admission into evidence of the three packages containing the heroin (R. 84); he objected to the admission of the fourth package on the ground that the percentage of its cocaine content had not been definitely established (R. 81-84).

Angelet testified in his defense that he had never sold narcotics (R. 111, 115), but had the narcotics in his possession for his own use (R. 111, 117, 146).

To rebut Angelet's testimony that he was a narcotics user and had suffered from a bleeding nose, nausea, dizzy spells and an inability to sleep or eat when jailed without drugs after his arrest (R. 149), the People introduced the testimony of Detective O'Brien that Angelet had stated, at the time he was booked, that he was not a user (R. 156). This statement was recorded in the precinct arrest book (R. 160-61). The People also introduced the testimony of the physician who examined Angelet on the day after his arrest, as well as on three subsequent occasions (R. 162, 163). This physician, Dr. Francis Sisca, testified that Angelet denied the use of drugs (R. 162), that Angelet had no marks indicating use of drugs (R. 162), and that Angelet never complained to him of anything that appeared to be a symptom of drug addiction (R. 163).

On February 2, 1951, the jury returned a verdict of guilty of the crime of unlawfully possessing a narcotic drug with intent to sell (R. 218). Thereafter, on February

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[2] N. Y. Penal Law § 1751 subd. 2 at that time provided, *inter alia*, that possession of two or more ounces of certain preparations, compounds or mixtures containing three per cent or more of the alkaloids of heroin or cocaine, established a presumption of intent to sell the narcotics (charge to jury, R. 215).

27, 1951, Angelet was sentenced to imprisonment as a second felony offender (N. Y. Penal Law § 1941) for a term of not less than ten nor more than twenty years. An appeal from the conviction was dismissed by the Appellate Division, First Judicial Department, on March 4, 1952 (N.Y.L. Jour., Mar. 5, 1952, p. 892, col. 1).

The Coram Nobis Application

In August, 1961, following this Court's decision in the *Mapp* case, petitioner filed a motion in the trial court for a writ of error coram nobis, alleging that his conviction was based upon evidence introduced in violation of the Fourth Amendment to the United States Constitution and that coram nobis was a proper remedy to invalidate that conviction (R. 229, 237). The Court (DAVIDSON, J.) denied the motion without a hearing. Judge DAVIDSON's memorandum opinion noted that petitioner had made no attempt to suppress the evidence or to prevent it from being introduced against him at trial, and held that the *Mapp* rule should not be applied retroactively to upset the conviction (R. 229-31; *People* v. *Angelet*, 221 N.Y.S. 2d 834 [Ct. of General Sessions, N. Y. Co., Nov. 16, 1961]). The Appellate Division affirmed without opinion (19 App. Div. 2d 649, 235 N.Y.S. 2d 828 [1st Dept. 1962]), and leave to appeal to the New York Court of Appeals was denied by Judge FULD of that Court on February 8, 1963 (R. 16). This Court denied a petition for a writ of certiorari on June 17, 1963 (R. 226; *Angelet* v. *New York*, 374 U. S. 839).

The Federal Habeas Corpus Proceedings

In May, 1963, Angelet applied to the United States District Court for the Southern District of New York for a writ of habeas corpus, claiming that he was entitled to the benefit of the *Mapp* rule and requesting a hearing on his claim that his conviction was based upon illegally seized

evidence (R. 1-4)[3]. After first reserving decision to await disposition of the then-pending certiorari petition (R. 223), the District Court (PALMIERI, J.), on September 20, 1963, denied the application for the writ (R. 249-50). District Judge PALMIERI assumed *arguendo* that the search of Angelet's apartment was conducted illegally (R. 249-50); he held, however, that even if this were so, it would not require the release of a prisoner who had been convicted under the law in force at the time of the trial and for a decade thereafter at a trial which accorded him full due process of law (R. 250).

On appeal, the United States Court of Appeals for the Second Circuit affirmed the denial of the habeas corpus application in a 7-2 decision rendered on June 11, 1964 (R. 257-81).

The majority opinion of Judge MEDINA, after first noting that the opinions in the *Mapp* case gave no sure indication of the Justices' views on the retroactivity question (R. 259-61), proceeded to a discussion of two of the principal arguments advanced in support of retroactive application of the exclusionary rule. The argument that petitioner was entitled to the writ on the ground that, at the time of his trial, the admission of illegally seized evidence violated the Constitution was rejected as simply unrealistic. The Court found no merit at all to the Blackstonian theory that an overruled decision (in this instance *Wolf* v. *Colorado*, 338 U. S. 25 [1949]) never was the law (R. 261-62). The argument that retroactivity was required because a constitutional question was involved was similarly rejected—the Court took the view that the development of constitutional law calls into play the same operations of the judicial process as does the development of a body of law in any other field (R. 262).

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[3] Angelet's Appellate Division brief (R. 236-248) and his petition for certiorari (R. 5-16) were annexed to the habeas corpus petition. The minutes of the 1951 trial (R. 17-219) were before the District Court as an Exhibit.

Turning next to a discussion of the reasons for and against a decision that the doctrine of *Mapp* v. *Ohio* was to be given retroactive effect, the Circuit Court found the considerations in favor of limiting its retroactive effect to be by far the more persuasive. The majority noted particularly that the essentially deterrent purpose of the exclusionary rule would not be served by a general retroactive application of the *Mapp* decision (R. 263-67); that the People of the State of New York had a legitimate interest in seeing that a sentence imposed upon a criminal defendant was fully executed where there was no question of the reliability of the evidence or of the fundamental fairness of the trial proceeding (R. 267-68); and that the effect of a retroactive application of the *Mapp* decision would be to open all past convictions involving searches and seizures to collateral attack with every new interpretation of the Fourth and Fourteenth Amendments, thus putting an overwhelming burden on judicial administration and seriously impairing the further development of constitutional law in this area (R. 269-70).

Circuit Judge MARSHALL, in his dissenting opinion, found an intent to apply the exclusionary rule retroactively in the text of the *Mapp* opinion (R. 272-75). He also noted that retroactive application had been given to this Court's decisions establishing the right of an indigent defendant to counsel, to a transcript for the purpose of taking an appeal without fees, and to the Court's increasingly stringent tests for determining the voluntariness of confessions (R. 275-76). As for the fact that *Mapp* was an overruling decision, Judge MARSHALL argued that the state could not claim any good faith reliance on *Wolf* v. *Colorado;* it was "on notice", he said, at the time of Angelet's trial, that the Supreme Court did not condone unlawful searches and seizures and looked to the states to provide corrective process (R. 276-77).

The dissent also took the position, relying on *Fay* v. *Noia,* 372 U. S. 391 (1963), that a federal judge acting on

a petition for habeas corpus must determine the constitutional validity of a state prisoner's confinement by assuming that his trial was held on the very day that his petition is being considered (R. 277-78). Applying this test, Judge MARSHALL found that "fundamental error" was committed at Angelet's trial (R. 297). In closing, the dissent argued that a practical difficulty with the majority approach was that it presented courts with the necessity of fixing an arbirary date for the *Mapp* rule to begin to take effect (R. 279).

Summary of Argument

The common law rule with respect to the use at trial of unlawfully obtained evidence was clear—illegality of the means by which evidence was procured was not a ground for its exclusion at trial, except where the evidence was an involuntary confession or was secured in violation of the self-incrimination privilege. This was the law in New York at the time of petitioner's trial and this rule of evidence had been given explicit constitutional sanction by this Court in *Wolf* v. *Colorado*, 338 U. S. 25 (1949). Not until *Mapp* v. *Ohio*, 367 U. S. 643 (1961) was decided, did any criminal defendant have a right to have evidence obtained by an illegal search excluded at his trial. Under the existing state of the law in 1951, there is no constitutional basis for concluding that petitioner had any "right" at trial to exclusion of the evidence to which he now objects. Thus, it is clear that the judgment of conviction pronounced upon him was valid when it was rendered and became final.

A. In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940), this Court rejected the notion that a constitutional decision must always be retrospectively applied. Rather, it emphasized that the question of retroactivity will depend upon the considerations in each type of case. It therefore employed a process of balancing the considerations in favor of retroactivity against those in favor of non-retroactivity and reached the conclu-

sion that society's interest in the finality of a judicial decision was the paramount consideration. This kind of balancing process is even more appropriate in a habeas corpus proceeding in view of the equitable nature of such a proceeding. And, since the instant case involves a judgment which was clearly valid when it became final, the policies underlying the doctrine of res judicata are highly significant in determining whether the new rule of law declared by this Court in *Mapp* should be retrospectively applied. Thus, the instant judgment of conviction carries a strong presumption of continuing validity which cannot be overcome unless there are, on balance, overriding societal purposes which can be achieved only by nullifying the judgment. This was the view taken by then Judge VINSON in *Warring* v. *Colpoys*, 122 F. 2d 642 (D. C. Cir.), *cert. denied* 314 U. S. 678 (1941), and by Judge FRIENDLY in *United States* v. *Sobell*, 314 F. 2d 314 (2d Cir.), *cert. denied* 374 U. S. 857 (1963), as well as by the Court below in the instant case.

B. On balance, it is clear that retroactive application of *Mapp* would be improper. Not only is the *Mapp* rule unrelated to a fair determination of guilt or innocence, but there are three factors which strongly militate against a retrospective application—legitimate and justifiable reliance upon the established law; the disruptive and chaotic effect upon the administration of criminal justice which would follow from such an application; and the total irrelevance of such an application to the purposes of the exclusionary rule.

The reliance by the state judicial system upon *Wolf* v. *Colorado* and its approval of the common law rule was unquestionably justified. If this Court were now to apply *Mapp* retrospectively, it would be telling the state courts that they should have done something which this Court had specifically told them they were not required to do. Moreover, the prosecutor, relying upon *Wolf*, undoubtedly pre-

pared his case on the basis of what this Court had held was the law. Thus he knew that he could use the evidence now objected to by petitioner as an integral part of his case, without regard to the means by which it had been obtained. He could, therefore, prove his case without introducing other evidence which might, in his judgment, have been merely cumulative and which the passage of time would, in all probability, make inaccessible if a retrial were ordered. Retrospective application of *Mapp* would require this Court to ignore such reliance, resulting in injury to the People of the State of New York because of the inability to impose criminal responsibility upon a violator of their laws.

The effect of a retrospective application of *Mapp* upon the orderly administration of the criminal law would be little short of catastrophic. Not only would a large number of initially valid pre-*Mapp* convictions be immediately affected, but, presumably, any new decision in the extremely fluid field of constitutional due process would also be retrospectively applied. Retrospective application would, of course, penalize society by giving significant advantages to a convicted prisoner both on collateral attack and, if successful, upon retrial of his case, as the inevitable result of delayed litigation. Finally, and perhaps most importantly, retroactive application of *Mapp* would be tantamount to telling state courts not only that they must decide every relevant federal question correctly at the time of trial, but also that they must anticipate any federal claim that might be raised in the future and decide that correctly as well, irrespective of whether the claim had ever been raised by the parties. The result would be decidedly detrimental to the responsibility of state court judges, who are charged with primary responsibility for the administration of criminal justice.

The primary purpose of the new exclusionary rule declared in *Mapp* is to deter unlawful police conduct. It is

clear that retroactive application would not in any way fulfill this purpose. To the extent that the exclusionary rule serves as an effective deterrent to unlawful police conduct, it is because the police, after *Mapp*, act with the knowledge that the fruits of illegal searches will not be admissible in criminal trials. Another purpose of the *Mapp* rule, the maintenance of judicial integrity (367 U. S. at 659-660), also could not be furthered by retroactive application. If anything, judicial integrity would be diminished by such an application since the precedental value of any decision would thereby be questioned and public confidence in the stability of judicial decisions would be seriously undermined. Moreover, to the extent that a healthy federalism is also a purpose of the *Mapp* decision, this would be subverted by a holding that any declaration of new law by this Court would automatically subject a valid state criminal conviction to the possibility of nullification by a federal habeas corpus court.

Against these many and weighty considerations militating against retroactive application of *Mapp* must be balanced the single fact that petitioner is presently deprived of his liberty. However, the circumstance that evidence which was properly admitted at petitioner's 1951 trial might not be admissible if he were retried today is not sufficient reason for sustaining the writ in the face of the compelling social interests which favor an essentially prospective application of the new rule declared in *Mapp*.

C. It is noteworthy that, in all of the cases in which this Court has retrospectively applied a new rule of law, the considerations militating against such an application were minimal. Thus, in cases such as *Eskridge* v. *Washington*, 357 U. S. 214 (1958); *Gideon* v. *Wainwright*, 372 U. S. 335 (1963); and *Jackson* v. *Denno*, 378 U. S. 368 (1964), there was some combination of weaker reliance, a less shocking effect on the orderly administration of criminal justice, and a singular ability of retrospective application to further

the purposes of the new rule. Moreover, in all these cases fundamental rights were violated, making the proceedings essentially lawless—the defendant had been deprived of a fair opportunity to litigate the question of his guilt or innocence. There is no such question of unfairness in the instant case and each element favoring a prospective application is substantially stronger than it was in any of those cases. The balancing process, therefore, properly demands a prospective application here just as it indicated a retrospective application in those cases.

Similarly, considerations of reliance and of the disruptive effect upon the administration of criminal justice are substantially different in the coerced confession cases decided by this Court on habeas corpus from what they are in the instant case. Whereas the use at trial of illegally seized evidence did not, prior to *Mapp*, violate any recognized right of a defendant, the use of a coerced confession has historically made a trial a fundamentally defective proceeding and rendered the resulting judgment void *ab initio*. In the coerced confession cases, habeas corpus relief was appropriate, since the trial court had applied the wrong standard in examining an issue which it knew it had to test. By contrast, a holding of retroactivity in the instant case would be a holding that the trial court should have initially examined an issue which this Court had specifically said it was not constitutionally required to examine and which the parties to the litigation had not even asked the Court to examine.

The approach which we suggest is not undercut by any of the arguments advanced by petitioner. His invocation of the Blackstonian theory of discovered law to rationalize a requirement of retroactivity in all cases patently ignores the fact that courts do make law. It has been rejected by modern scholars and should be discarded as an unsound fiction, especially inappropriate in the habeas corpus field. Petitioner's allusion to the case or controversy clause of

the Constitution is plainly inapplicable. That requirement is obviously satisfied in the instant case since this Court must decide the retroactivity issue to dispose of the proceedings at bar.

Application of a balancing process is in no way affected by the line of cases including *United States* v. *Schooner Peggy,* 5 U. S. (1 Cranch) 102 (1801) and *United States* v. *Chambers,* 291 U. S. 217 (1934). These cases establish no general rule of retroactivity. They are, rather, simply cases in which this Court has followed the common law principle of abatement, applying the law as it existed at the time a case was reviewed in the direct appellate process and before the judgment in question ever reached finality. Indeed the implication of these cases is that, if the judgment has reached finality and cannot be said to be void *ab initio,* it should not be upset.

Moreover, application of the abatement principle indicates that the problem of "drawing lines", suggested by the dissent below (R. 271, 279-281), is not at all a difficult one. It is logical, in view of the proper emphasis upon finality of judgments found throughout our history, to hold simply that a state conviction which had reached finality prior to the *Mapp* decision should not be open to collateral attack by way of habeas corpus. This approach would be in accord with this Court's treatment of the cases of *Stoner* v. *California,* 376 U. S. 483 (1964); *Fahy* v. *Connecticut,* 375 U. S. 85 (1963); and *Ker* v. *California,* 374 U. S. 23 (1963).

ARGUMENT

Balancing the considerations relevant to the problem of retroactivity leads inescapably to the conclusion that *Mapp* v. *Ohio* should not be applied on habeas corpus to nullify a valid final judgment of conviction.

The common law rule with respect to the use at trial of illegally obtained evidence was clear—the illegality of the means by which evidence was procured was not a ground for its exclusion at trial, except where the evidence was an involuntary confession or was secured in violation of the self-incrimination privilege. McCormick, Evidence § 137 (1954); 8 Wigmore Evidence, §§ 2183-2184b, 2264 (McNaughton rev. 1961); Note, 150 A.L.R. 560 (1943). The early federal rule was identical (*cf. Adams* v. *New York*, 192 U. S. 585 [1904]; *United States* v. *Wilson*, 163 Fed. 338 [S.D.N.Y. 1908]; *Firth Sterling Steel Co.* v. *Bethlehem Steel Co.*, 199 Fed. 353 [E. D. Pa. 1912]), as was the rule in virtually all the states prior to the decision of this Court in *Weeks* v. *United States*, 232 U. S. 383 (1914), and in most states even after *Weeks*.[4]

The New York courts, at the time of petitioner's trial, adhered to the rule of admissibility established in *People* v. *Adams*, 176 N. Y. 351 (1903), *aff'd sub nom Adams* v. *New York*, 192 U. S. 585 (1904), and *People* v. *Defore*, 242 N. Y. 13 (1926), relying upon the availability of other remedies to protect the individual's right to privacy. *People* v. *Defore*, *supra* at 19, 23-24. In 1949, less than two years before petitioner's trial, this Court itself had held specifically that the Fourteenth Amendment to the Constitution did not prohibit the admission of evidence obtained by an unreasonable search and seizure. *Wolf* v. *Colorado*, 338 U. S. 25 (1949).

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[4] See appendices in *Wolf* v. *Colorado*, 338 U. S. 25, 33-39 (1949) and *Elkins* v. *United States*, 364 U. S. 206, 224-34 (1960).

In view of this state of the law it can hardly be said that petitioner had any "right" at the time of his 1951 conviction to have illegally seized evidence excluded at his trial. Not until *Mapp* v. *Ohio*, 367 U. S. 643 (1961) was decided, did a defendant have any such right". The judgment of conviction in the instant case was thus clearly valid at the time it became final in 1952, upon the dismissal of petitioner's appeal. Only if some compelling societal objectives would be achieved by its present nullification should that judgment now be vitiated by a retroactive application of the *Mapp* rule.

A.

The question of retroactivity can properly be decided only by a process of balancing all relevant factors.

In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371 (1940), this Court emphasized the importance of the existence of a valid final judgment as it laid to rest the idea that a constitutional decision must always be retrospectively applied. The question there was whether effect should be given to a 1936 decree of a federal district court providing for a plan of readjustment of the Drainage District's indebtedness. The lower federal courts had refused to accept a plea of res judicata based upon the 1936 decree because the statute under which the decree was issued had subsequently been declared unconstitutional by this Court in *Ashton* v. *Cameron County District*, 298 U. S. 513 (1938).

In reversing, Mr. Chief Justice HUGHES spoke for a unanimous Court:

> "The actual existence of a statute, prior to such determination [of unconstitutionality], is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration. The effect of the subsequent

> ruling as to invalidity may have to be considered in various aspects,—with respect to particular relations, individual and corporate, and particular conduct, private and official. Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination. These questions are among the most difficult of those which have engaged the attentions of courts, state and federal, and it is manifest that an all-inclusive statement of a principle of absolute retroactive invalidity cannot be justified." *Chicot County Drainage District* v. *Baxter State Bank, supra* at 374.

This language and the approach it dictates are highly pertinent to the case at bar. Although the instant case involves the nullification of a prior judicial decision rather than a statute, the law of *Wolf* v. *Colorado* is as much an "operative fact" as a statute and likewise has consequences which "cannot be justly ignored".

This Court was aware of the constitutional questions in *Chicot* and nevertheless held that a balancing of all considerations should result in the application of settled principles of res judicata. Thus, the bondholders in the *Chicot* case were not allowed to challenge the decree on collateral attack, notwithstanding that an intervening decision of this Court had held that the statute under which their rights had previously been declared was unconstitutional.

Petitioner would distinguish the instant case from *Chicot* on the ground that, since this is a habeas corpus case, principles of res judicata relied upon there are not applicable here (Br. pp. 7-8). He thus seeks to avoid any consideration of the impact of the final judgment in this case by arguing, in effect, that a habeas corpus court must consider each application for a writ as if the peti-

tioner were being tried anew each day that he is imprisoned.[5] The thrust of this contention is that there is really no issue of retroactivity in a case such as this since there is no significance to the existence of a final judgment. Such an argument, of course, totally disregards both the equitable nature of the writ of habeas corpus and the necessity for a habeas corpus court, in the exercise of its discretion, to consider the social interest in the finality of judgments.

This Court long ago observed that "[t]he power conferred on a federal court to issue a writ of *habeas corpus* . . . is not unqualified, but is to be exerted in the exercise of a sound discretion." *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, 17 (1925). And, as this Court has more recently declared:

> "Discretion is implicit in the statutory command that the judge . . . 'dispose of the matter as law and justice require,' 28 U.S.C. § 2243 . . . habeas corpus has traditionally been regarded as governed by equitable principles." *Fay* v. *Noia*, 372 U. S. 391, 438 (1963).

See also Brennan, *Federal Habeas Corpus and State Prisoners: An Exercise in Federalism*, 7 Utah L. Rev. 423, 438 (1961). In view of the equitable nature of the writ, a balancing process such as that suggested in *Chicot* is particularly appropriate to a determination of whether *Mapp* should be applied retrospectively.

Furthermore, although the nature of the writ dictates that a judgment of conviction may always be subject to attack on habeas corpus, this in no way means that the Court must ignore the significance of the valid final judgment. *Fay* v. *Noia*, *supra*, does not suggest otherwise. Indeed, as this Court observed in *Noia*, the principle that res judicata is inapplicable in habeas proceedings is "really but an instance

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[5] This argument is made explicitly by the dissent in the Court below (R. 271, 278). See also Meador, *Habeas Corpus and the "Retroactivity" Illusion*, 50 Va. L. Rev. 1115, 1117 (1964).

of the larger principle that void judgments may be collaterally attacked." 372 U. S. at 423. It is implicit in this statement that, when a final judgment is not void *ab initio*, the policies underlying the doctrine of res judicata are highly relevant to a determination of whether a new rule of law should be retrospectively applied. A judgment which was unquestionably valid when rendered and which became final before the law was changed carries a strong presumption of continued validity. In the absence of overriding societal purposes that can be achieved only by upsetting such a judgment, this presumption cannot be overcome.

The weight to be given a final judgment, even on habeas corpus, is illustrated by the case of *Warring* v. *Colpoys*, 122 F. 2d 642 (D. C. Cir), *cert. denied* 314 U. S. 678 (1941). Warring was convicted in 1939 of four counts of criminal contempt. In reliance upon this Court's interpretation of the federal contempt statute, he entered a plea of guilty. In 1941, this Court overruled its prior decision defining the limits of the federal contempt statute and so changed its interpretation that Warring could not have been convicted subsequent to the overruling decision.

The Circuit Court held that habeas corpus would not lie to nullify what was a valid judgment at the time it was rendered. The Court did not view the case in terms of whether Warring could be convicted under the new law. Rather, it applied a balancing process, including a consideration of the policies underlying the doctrine of res judicata. Focusing on the significance of the final judgment and concluding that under any realistic view it was validly rendered, Judge (later Chief Justice) VINSON stated in pertinent part:

> "These considerations [of the nature of the law and its administration] should guide the lawmakers and the lawappliers in making their determinations in respect of whether a change in the law is to be effective only for the future or also for the past, and if

the latter, to what extent. And these considerations should be applicable to both sides of a potential litigation, civil or criminal, so that we may have our rules of the game as we go.

We believe that appellant is not entitled to discharge upon the habeas corpus writ. The District Court had the power to sentence him in a criminal contempt proceeding in 1939. The *Nye* case of 1941 should not be applied so as to sweep away that power as of 1939. This collateral attack, then is unavailing. We reject the idea that if a court was considered to have the power in 1939 to do a certain thing under existing statutory construction, and in 1941 that construction is changed so that it no longer has the power to do that thing, it should be concluded that it never had the power in 1939. It has often been said that the living should not be governed by the dead, for that would be to close our eyes to the changing conditions which time imposes. It seems even sounder to say that the living should not be governed by their posterity for that, in turn, would be downright chaotic." *Id.* at 646-47.

The same approach was recently employed by the Court of Appeals for the Second Circuit in *United States* v. *Sobell*, 314 F. 2d 314 (2d Cir.), *cert. denied* 374 U. S. 857 (1963). In concluding that an overruling decision of this Court should not be applied retroactively on collateral attack under 28 U.S.C. § 2255 so as to upset a valid final judgment, Judge FRIENDLY stated for a unanimous court:

> "There is an inevitable attraction in the position that a person convicted of a serious crime should receive a new trial whenever a later decision of the highest court indicates that, with the benefit of hindsight, a different course should have been followed at his trial in any consequential respect. Yet for courts to yield broadly to that attraction not only would

> cause 'litigation in these criminal cases [to] be interminable' 332 U. S. at 182, 67 S. Ct. at 1593, but, in the sole interest of those already convicted of crime, would drastically impair the inability of the Government to discharge the duty of protection which it owes to all its citizens." *Id.* at 324.

Having thus rejected the argument that there is something in the nature of habeas corpus which requires a court to look at the case as if the petitioner were being retried each day of his detention, Judge FRIENDLY went on to discuss the proper approach that a habeas corpus court should follow in exercising its discretion:

> "When a defendant who has been tried fairly in accordance with the law as it was understood at the time seeks judicial relief because of new light on a point of law affecting an aspect of his trial, his request must be balanced against the rightful claims of organized society as reflected in the penal laws. All this is the wisdom behind the doctrine that limits collateral attack on criminal judgment." *Id.* at 325 (Citations omitted).

B.

A balancing of the relevant considerations clearly militates against retroactive application of *Mapp*.

It is clear that, on balance, the new rule of law announced in *Mapp* v. *Ohio* should not be retrospectively applied. Strong reliance upon the overruled decision and the potential disruptive effect on the administration of criminal justice, coupled with the fact that a retrospective application would not in any sense further the purpose of the new rule, far outweigh the claimed "right" of the petitioner, a "right" which does not even call into question the fairness of the trial by which he was convicted and which was not ever considered a right until the decision in *Mapp*.

Thus, the circumstance that evidence which was properly admitted at petitioner's 1951 trial might not be admissible if he were retried today is not sufficient reason for sustaining the writ in the face of the compelling social interests which favor non-retroactive application of the new rule established by *Mapp*.

1. Justifiable reliance.

One of the most significant considerations in determining whether a new rule of law is to be applied prospectively or retrospectively is the extent of legitimate reliance by the parties on the old law.[6] It is clear that in any trial conducted prior to *Mapp* there was considerable and justifiable reliance by the state judicial system upon this Court's ruling in *Wolf* v. *Colorado*, which specifically held that the introduction of illegally seized evidence at a state trial was no constitutional bar to a valid judgment.[7] For this Court now to apply *Mapp* retrospectively and nullify petitioner's conviction would be to hold that the state courts should have done something which this Court had

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[6] See, *e.g.*, Memorandum of Solicitor General (later Mr. Justice) Jackson for the Commissioner of Internal Revenue in Reply to Petition for Rehearing in *Helvering* v. *Gerhardt*, 304 U. S. 405, *rehearing denied* 305 U. S. 669 (1938) (No. 779, Oct. Term 1937). The Government there took the position that this Court has the power to limit the retroactive effect of an overruling decision but that, on balance, the case before the Court was not an appropriate one for the exercise of the power because the petitioners there had no legitimate claim of reliance upon an overruled decision. *Id.* at 9-16. See also 1A MOORE, FEDERAL PRACTICE 4082-85 (1961).

[7] We do not concede that the evidence introduced at petitioner's trial was the product of an illegal search. Indeed, the State has never been called upon to produce evidence relating to probable cause or consent. *Cf.* Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 338-39. We do not, however, claim equitable standing for the actions of the police in searching petitioner's apartment (*cf.* Pet. Br., p. 13).

plainly told them they were not constitutionally required to do.[8]

Another important element of reliance in the instant case is that of the prosecutor. The District Attorney, prior to *Mapp*, undoubtedly prepared his case on the basis of what this Court had told him was the applicable law. In doing so, he knew that he could use the evidence now objected to by petitioner as an integral part of his case, irrespective of the means by which it had been obtained. This permitted him to prove his case without introducing other evidence which might, in his judgment, have been merely cumulative and which the passage of time would, in all probability, make inaccessible if a retrial were ordered. The reliance is, therefore, clear. The injury resulting from retrospective application of *Mapp* would thus be substantial—injury to the People of the State of New York in the inability to impose criminal responsibility upon a violator of their laws.

2. The disruptive effect on the administration of criminal justice.

One obvious result of holding *Mapp* retroactive would be the possible nullification of a substantial number of state convictions.[9] The fact that a significant number of

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[8] Petitioner argues that it would be "manifestly absurd" to say that he knew or should have known of his right to be tried free from any tainted evidence (Br., pp. 11-12). There are obviously two sides to this argument. If it would have required "clairvoyance" on the part of the petitioner to know of this right, it would likewise impose a requirement of clairvoyance on the State to hold that the judgment is invalid because the State knew or should have known of such a right. The simple fact is that there was no such "right" until *Mapp*. To the extent that petitioner contends that the State should have known of the requirement of the exclusionary rule, the same knowledge must be imputed to petitioner.

[9] Even the monograph of Judge Sobel, to which petitioner refers (Br., pp. 14-15), observes that an issue of search and seizure was present in approximately 10 per cent of all cases which came before him after January, 1960.

convictions would be immediately affected is, however, but a single aspect of the chaos which would result from such a holding.

To hold the *Mapp* decision applicable on this habeas corpus proceeding is tantamount to telling the state courts that they must not only decide every federal question correctly at the time of the trial, but must also anticipate any federal claim that might be raised in the future, and must in addition decide those claims correctly. In short, it would place the state courts in an impossible position—theoretically burdened with primary responsibility for administration of the criminal law (see *e.g., Murphy* v. *Waterfront Commission,* 378 U. S. 52 [1964]; *Abbate* v. *United States,* 359 U. S. 187, 195 [1962]), yet faced always with the knowledge that their sanction for one who violates the criminal law can never be regarded as having any finality.

The result would be a decidedly detrimental effect on the future development of the criminal law. In addition to the subversive effect upon the responsibility of a trial judge faced with a difficult question and constantly aware that his ruling carries little finality, it might also lessen the incentive of a defense counsel to challenge an existing rule of law in a developing area—a different course could be pursued at the trial and the challenge could always be made on habeas corpus.

If the *Mapp* decision is applicable in this case, for example, then presumably any subsequent decision redefining the scope of an unconstitional search and seizure would also be applicable on habeas corpus. Similarly, any new decision of this Court aimed at raising the standard of police practices would also be applicable on habeas corpus—even if the question had never been raised by the petitioner at his trial or on appeal, and regardless of whether the petitioner's trial had been a procedurally fair one.

Application of the exclusionary rule to convictions which became final prior to the change in the law would, of course, afford significant advantages to the convicted prisoner who seeks the benefit of the new rule on habeas corpus—advantages which he would not have had at his trial had the search and seizure issue been litigated at that time. Both on the collateral attack itself and, if that is successful, upon retrial of his case, the prisoner will benefit by a delay in litigation of his claim. A claim of illegal search and seizure is one which ordinarily turns on contested facts not susceptible of documentary proof. Although the burden of proof is upon the petitioner in a habeas corpus proceeding, *Johnson* v. *Zerbst*, 304 U. S. 458, 468-69 (1938), the practicalities of rebutting a claim will usually require the government to produce its own witnesses. The question of whether there was probable cause for arrest without a warrant, for example, can practically be resolved only by requiring the government to show the facts upon which its agents acted. Similarly, the question of whether there was consent to a search will usually have to be resolved by accepting one of two irreconcilable versions of the facts. As to either issue, it is clear that the prisoner stands to benefit by delayed litigation, with the inevitable absence of government witnesses and loss of other evidence. As Judge FRIENDLY noted in *United States* v. *Sobell*, 314 F. 2d 314, 325 (2d Cir.), *cert. denied* 374 U. S. 857 (1963):

> "collateral attack can come at any time. Yet normally it is quite academic to talk of a new trial ten or fifteen years after the event; in most cases to direct one after such an interval is in practical result to order a release from further punishment, although the defendant does not even contend that he is entitled to that relief from the courts."

See also Amsterdam, *Search, Seizure, and Section 2255*, 112 U. Pa. L. Rev. 378, 387-88 n. 43 (1964); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 517-18 (1963).

On retrial of a case, too, where collateral attack has succeeded, the passage of time would work to the accused's advantage. As the majority below indicated (R. 268-69), it is reasonable to suppose that there may have been many state convictions in which prosecutors, pursuant to the rulings of this Court, relied upon illegally obtained evidence without making use of other incontrovertible proofs —not now available due to death of witnesses or other circumstances—simply because the other proofs would have been merely cumulative. Particularly in narcotics cases, where search and seizure issues frequently arise, the key government witnesses are often "special employees"—available at the time of the initial prosecution, but not easily found many years later. See Amsterdam, *loc cit. supra* at 387 n. 42 (1964).

Another problem is that of the effect of a holding of retroactivity in this case upon the achievement of the underlying purposes of the criminal law itself. While there are a number of more or less conflicting theories as to the proper aims of the criminal law, there can be no doubt but that concepts of deterrence (of prospective law-breakers), restraint (by imprisonment, where necessary to protect society from proven law-breakers), and rehabilitation (of past law-breakers) are central to any modern system of sentencing and treating offenders. The prisoner who seeks to raise a claim of illegal search and seizure on habeas corpus is one who has been proven beyond a reasonable doubt, by reliable evidence, to be one of a class of persons whom society has found should be subjected to imprisonment in order to restrain and (if possible) rehabilitate him, and in order to deter others from engaging in similar anti-social conduct.[10]

None of those three essential functions will be furthered by a holding that a *Mapp* claim is available on habeas

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[10] See Amsterdam, *loc. cit. supra* at 387 (1964).

corpus where not raised at trial. The resultant undercutting of the restraint function is obvious. As to the effects of such a holding upon the deterrent and rehabilitative functions, it is plain that they are not advanced by long delayed litigation of a claim which does not go either to questions of guilt or innocence or to questions of trial fairness. Professor Bator has written particularly cogently on this subject:

> "Surely it is essential to the educational and deterrent functions of the criminal law that we be able to say that one violating that law will swiftly and certainly become subject to punishment, just punishment. Yet this threat may be undermined if at the same time we so define the processes leading to just punishment that it can really never be finally imposed at all. A procedural system which permits an endless repetition of inquiry into facts and law in a vain search for ultimate certitude implies a lack of confidence about the possibilities of justice that cannot but war with the effectiveness of the underlying substantive commands. Furthermore, we should at least tentatively inquire whether an endless reopening of conviction, with its continuing underlying implication that perhaps the defendant can escape from corrective sanctions after all, can be consistent with the aim of rehabilitating offenders. The first step in achieving that aim may be a realization by the convict that he stands in need of rehabilitation; and a process of reeducation cannot, perhaps, even begin if we make sure that the cardinal moral predicate is missing, if society itself continuously tells the convict that he may not be justly subject to reeducation and treatment in the first place. The idea of just condemnation lies at the heart of the criminal law, and we should not lightly create processes which implicitly belie its possibilities." Bator, *loc. cit. supra* at 452.

3. The purposes of the *Mapp* rule cannot be achieved by its retroactive application.

In *Mapp* v. *Ohio* this Court emphasized that the primary reason for imposing the exclusionary rule upon the states is to deter law enforcement officials from making unreasonable invasions of personal privacy (367 U. S. 643 at 656):

> "Only last year the Court itself recognized that the purpose of the exclusionary rule is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it. *Elkins* v. *United States*, [364 U. S. 206] at 217."

The deterrent purpose would not be served by application of the exclusionary rule to past trials since it is self-evident that past conduct cannot be deterred. To the extent that the exlusionary rule serves as an effective deterrent to unlawful police conduct it is because the police, after *Mapp*, act with the knowledge that the fruits of illegal searches will not be admissible in criminal trials.[11]

The deterrent purpose of the exclusionary rule has, of course, been a focal point for a number of courts which, presented with *Mapp* claims in post-conviction proceedings, have held that the rule should not be applied retroactively to judgments of conviction which had become final prior to *Mapp*. See, in addition to the opinion below, *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11, 17-19 (5th Cir. 1963), *cert. granted* 377 U. S. 930 (No. 95, Oct. Term 1964); *Commonwealth ex rel. Wilson* v. *Rundle*, 412 Pa. 109, 194 A. 2d 143, 146-50 (1963); *State* v. *Smith*, 43 N. J. 67, 202 A. 2d 669, 675 (1963) (citing *State* v.

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[11] Indeed, the evidence indicates that police conduct in the search and seizure area has been notably improved since the *Mapp* rule was announced. See, *e.g.*, Kamisar, *Public Safety, Individual Liberties: Some "Facts" and "Theories"*, 53 Jour. Crim. Law, Criminology & Police Science 171 (1962).

[*James*] *Smith*, 37 N. J. 481, 483 *et seq.*, 181 A. 2d 261, 263 *et seq.* where the purposes of the rule are discussed at some length by Chief Judge WEINTRAUB); *State ex rel. Beltkowski* v. *Tahash*, 266 Minn. 182, 123 N. W. 2d 207, 209 (1963), *cert. denied* 375 U. S. 947 (1963), *rehearing denied* 375 U. S. 989 (1964).

This is also the view taken by most of the contemporary commentators. Professor Freund, for example, has written that "[s]ince the new evidentiary rule goes not to the intrinsic fairness of the trial but to an effective sanction for the enforcement of rules of police conduct, and since that sanction will apply prospectively, the compulsion to apply the exclusionary policy retrospectivly is relatively weak; latitude here [as with respect to the development of constitutional boundaries in the search and seizure field, see *Ker* v. *California*, 374 U. S. 23 (1963)] may well be left for local option." Freund, *New Vistas in Constitutional Law*, 112 U. Pa. L. Rev. 631, 637 (1964). *Accord*, Weinstein, *Local Responsibility for Improvement of Search and Seizure Practices*, 34 Rocky Mt. L. Rev. 150, 171-72 (1962); Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 317, 338-42; Bender, *The Retroactive Effect of an Overruling Decision; Mapp* v. *Ohio*, 110 U. Pa. L. Rev. 650 (1962); Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 Yale L. J. 907, 942-43 (1962); Note, *Collateral Attack of Pre-Mapp* v. *Ohio Convictions Based on Illegally Obtained Evidence in State Courts*, 16 Rutgers L. Rev. 587 (1962).

Deterrence of unlawful police conduct has not provided the sole justification for overriding the normal common law rules governing the admissibility of inherently reliable evidence where that evidence has been obtained by unreasonable search and seizure. The *Mapp* opinion pointed particularly to another consideration—"the imperative of judicial integrity" (367 U. S. at 659, 660; and see *Elkins* v. *United States*, 364 U. S. 206, 222 [1960]).

Thus, the belief that courts should not condone illegal police conduct has long been urged as a reason for adoption of the exclusionary rule. See *People* v. *Cahan*, 44 Cal. 2d 434, 445, 282 P. 2d 905, 911-12 (1955). Like the purpose of deterrence, however, it would not be furthered by reopening past convictions. Surely the integrity of state courts which acted pursuant to the common law rules of admissibility and to this Court's decision in *Wolf* v. *Colorado* is not to be "vindicated" through a reopening of state court final judgments by federal habeas corpus courts.

Judicial integrity in a somewhat different sense would, however, be adversely affected by a decision which held the exclusionary rule applicable to pre-*Mapp* state convictions. One of the functions of the decisions of this Court is surely to provide a guide for future conduct. During the period 1949 to 1961 no less than 24 states conducted criminal prosecutions in accordance with the decision in *Wolf* v. *Colorado*.[12] To hold that the reliance of state courts upon that decision was wholly misplaced is to question the precedental value of any new decision in the criminal law field. Indeed, a retroactive application of *Mapp* would seriously undermine the integrity of the courts by undermining public confidence in judicial decisions.

Similarly, to the extent that "the avoidance of needless conflict between state and federal courts" (367 U. S. at 657-58) is also a purpose of the *Mapp* decision, it too would be frustrated by retroactive application of the exclusionary rule. Nothing could be more subversive of a healthy federalism than a holding that any subsequent decision of this Court would automatically subject a state criminal conviction to the possibility of nullification by a federal habeas corpus court, irrespective of the fact that there

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[12] See the appendix in *Elkins* v. *United States*, 364 U. S. 206, 224-25 (1960).

was a valid final judgment prior to the change in the law and irrespective of the fact that the issue was never raised in the state courts before final judgment.

C.

Non-retroactive application of *Mapp* is fully consistent with decisions of this Court.

In cases such as *Eskridge* v. *Washington*, 357 U. S. 214 (1958), *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Jackson* v. *Denno*, 378 U. S. 368 (1964), it is clear that retroactive application of a new rule was justifiable. In those cases, the claimed violation of the petitioners' rights had deprived them of a fair opportunity to litigate the question of their guilt or innocence. In such cases the defendant was afforded "no process of law"[13]—the judgment was, in effect, void *ab initio*, and thus subject to attack on habeas corpus just as any void judgment is always open to collateral attack. *Fay* v. *Noia*, 372 U. S. 391, 423 (1963). In the instant case, even the petitioner does not contend that he was denied a fair opportunity to contest his guilt or innocence at his 1951 trial.

The focus was clearly on fundamental fairness in *Eskridge* v. *Washington*, *supra*, which applied the rule established in *Griffin* v. *Illinois*, 351 U. S. 12 (1956), to a past conviction. In *Griffin*, this Court, finding that appellate review had become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant, concluded that the due process and equal protection clauses of the Fourteenth Amendment required that indigent defendants be furnished with a trial transcript

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[13] Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 455-60. See also Traynor, *Mapp* v. *Ohio at Large in the Fifty States*, 1962 Duke L. J. 319, 340-41.

(or an adequate substitute therefor), where such a record was a prerequisite to full appellate review. The Court thus held that a defendant's lack of material wealth "could not be used as a basis to deprive a defendant of a fair trial." *Id.* at 17.

Not only was the element of trial fairness an important one favoring retroactivity in *Eskridge*, but those factors which strongly militate against such an application in the instant case were much weaker in *Eskridge*. Thus, for example, any claim of reliance by state officials in *Eskridge* could only have been based upon absence of any constitutional rule regarding the rights of an indigent defendant who wished to appeal his conviction. Moreover, the disruptive effects of applying *Griffin* retroactively were insignificant compared to those which would follow a retroactive application of *Mapp*. There is no problem of delay in litigation in the *Eskridge* situation, since the record will clearly show whether or not a transcript was provided upon request. Even if no such transcript was initially provided, compliance with *Griffin* requires only an appeal on an existing record, not a new trial. Furthermore, since the *Griffin* rule was totally unrelated to the conduct of a trial, its retroactive application did not undermine the confidence of state court judges in the decisions of this Court, nor undercut the State's primary responsibility for administration of the criminal law.

Similarly, in *Gideon* v. *Wainwright*, *supra*, this Court found it fundamental that a defendant "cannot be assured a fair trial unless counsel is provided for him." *Id.* at 344. The right asserted in *Gideon* is deemed so fundamental that a judgment obtained in violation thereof is void *ab initio*. In *Gideon*, unlike the instant case, the element of reliance was weak. For, despite this Court's opinion in *Betts* v. *Brady*, 316 U. S. 455 (1942), a long line of cases had characterized the right to counsel as fundamental. *Gideon* v. *Wainwright*, *supra* at 341, 343-344 and cases cited therein.

Most importantly, however, the *Gideon* rule reflects the general belief that it is simply unfair to hold a man in prison where he has not had a fair opportunity to litigate the question of his guilt or innocence. Despite some disruptive effects upon the administration of criminal justice, on balance it is clear that a retroactive application of the rule established in *Gideon* was justifiable.[14]

In *Jackson* v. *Denno*, 378 U. S. 368 (1964), this Court was concerned with the fairness of the New York procedure for determining the voluntariness of a confession and with the implications of that procedure for the fairness of the trial itself. The Court held that a procedure under which the jury simultaneously considered the question of the voluntariness of the defendant's confession as well as the ultimate question of guilt or innocence resulted in an unfair determination of both issues. Thus, although there was some element of reliance upon this Court's decision in *Stein* v. *New York*, 346 U. S. 156 (1953), the *Jackson* decision was nevertheless applied retroactively.[15]

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[14] The rule requiring counsel at trial was actually applied retroactively in the *Gideon* case itself, which arose on habeas corpus. See also *Doughty* v. *Maxwell*, 376 U. S. 202 (1964); *United States ex rel. Durocher* v. *LaVallee*, 330 F. 2d 303 (2nd Cir.), *cert. denied* 377 U. S. 998 (1964).

[15] The *Jackson* decision itself was made in a habeas corpus case. In addition, the Court applied the decision to at least one other past conviction, vacating the Circuit Court's decision in *United States ex rel. McNerlin* v. *Denno*, 324 F. 2d 46 (2d Cir. 1963), and remanding the case to the District Court for further proceedings not inconsistent with the *Jackson* opinion. *McNerlin* v. *Denno*, 378 U. S. 578 (1964). The New York Court of Appeals has recently expanded the scope of coram nobis to provide for a hearing in the trial court on any *Jackson* claim where the question of voluntariness had been submitted to the jury. *People* v. *Huntley*, —— N. Y. 2d —— (Docket No. 391, dec'd Jan. 7, 1965). Compare *People* v. *Muller*, 11 N. Y. 2d 154, 182 N. E. 2d 99, *cert. denied* 371 U. S. 850 (1962), denying post-conviction relief for a *Mapp* claim where the question had not been raised prior to final judgment.

The balancing process suggested herein is entirely consistent with the coerced confession cases decided by this Court on habeas corpus, and the reliance of the dissent below upon a claimed analogy to such cases (R. 271, 276) is wholly misplaced. Whereas the use at trial of illegally seized evidence did not, prior to *Mapp*, violate any recognized right of a defendant, the use of a coerced confession has historically made a trial a fundamentally defective proceeding and rendered the resulting judgment void *ab initio*. The principle has long been established, in both English and American law, that a defendant is deprived of due process of law where an involuntary confession is admitted into evidence against him at trial. *Bram* v. *United States*, 168 U. S. 532, 545 (1897); McCormick, Evidence § 111 (1954). Thus, in *Brown* v. *Mississippi*, 297 U. S. 278 (1936), the Court spoke of the use of a coerced confession as "a wrong so fundamental that it made the whole proceeding a mere pretense of a trial and rendered the conviction and sentence wholly void." *Id.* at 286. So serious is the wrong that even a defendant's failure to pursue the proper state procedural remedy for testing the voluntariness of a confession will not bar the federal courts from considering the claim on habeas corpus, at least where the failure does not constitute a deliberate by-passing of the State courts. *Fay* v. *Noia*, *supra*. As this Court held in the *Noia* case, the use of a coerced confession makes a trial such a "fundamentally defective" proceeding as to render the resulting imprisonment intolerable. *Id.* at 414-415.

Moreover, considerations of reliance and of the disruptive effect upon the administration of criminal justice are substantially different in coerced confession cases from what they are in the instant case. Coerced confessions have always been inadmissible at trial. It is one thing to say that a trial court applied the wrong standard in examining an issue which it knew it had to test, and which, in most cases, could be reexamined on the basis of an existing

record, thus avoiding most problems of delayed litigation which are present in the instant case. It is quite a different thing to say that a trial court should have initially examined an issue which this Court had specifically said it was not constitutionally required to examine, and which the parties to the litigation did not even ask it to examine.

In asserting that the Court in *Mapp* did not create a new right "but merely removed a procedural bar to the assertion of an existing one" (Br., p. 16), petitioner wholly ignores the fact that *Wolf* v. *Colorado* had specifically held that there was no "right" of a defendant to have illegally obtained evidence excluded at trial. Instead, invoking the Blackstonian fiction of discovered law (Br., pp. 6-7, 17), petitioner asks this Court to accept "the ancient dogma that the law declared . . . had a Platonic or ideal existence before the act of declaration". *Great Northern Railway* v. *Sunburst Oil and Refining Co.*, 287 U. S. 358, 365 (1932). This "dogma" completely ignores the realities of the judicial process. As Mr. Justice HOLMES said, "The common law is not a brooding ominipresence in the sky." *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917) (dissenting opinion). On the contrary, the common law—the law as developed by the courts—is in a very real sense "made" by judges.[16]

When this Court overrules a prior decision, it is unquestionably making new and different law. This is vividly demonstrated by the very case at bar. *Wolf* v. *Colorado* was no less the law for its day than *Mapp* v. *Ohio* is for today. The very process by which *Mapp* replaced *Wolf*, a flexible process allowing for creative growth of the law

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[16] Mr. Justice Cardozo, for example, recognized this when he wrote, "We must get away . . . from the notion that law is fixed and immutable, that the conclusion which the judge declares, instead of being itself more or less a tentative hypothesis, . . . has a genuine pre-existence, that judgment is a process of discovery, and not in any degree a process of creation . . . ." THE GROWTH OF THE LAW, pp. 53-54 (1924).

to solve contemporary problems, emphasizes the necessity of recognizing that courts do indeed make law, not "discover" it.

This reality was recognized by this Court in declining to give retroactive effect to an overruling decision in the *Chicot* case and is equally applicable here. As this Court has said, legal fictions are not to be introduced into habeas corpus. *Fay* v. *Noia*, 372 U. S. 391, 439 (1963). A determination of whether to give retroactive effect to the *Mapp* rule, a question with enormous implications for the future course of American criminal justice, is surely not to be made on the basis of a fiction.

The issue in the instant case is not whether this Court should "prospectively overrule" a prior decision. The theory of prospective overruling is designed to limit the effect of an overruling decision upon the parties to the litigation which results in the declaration of a new law. Whether *Wolf* should have been prospectively overruled could have become an issue only in the *Mapp* case itself.[17] The issue in this case, however, is whether the new law declared in *Mapp*, having already been applied to the litigants in that case, must be applied to all cases, past as well as present, or may be limited to those cases in which no final judgment had been rendered prior to *Mapp*.

Petitioner's reliance on cases such as *United States* v. *Schooner Peggy*, 5 U. S. (1 Cranch) 102 (1801), is wholly misplaced—they stand simply for the principle that an appellate court, on direct review of the decision of a lower court, will apply the law as it exists at the time of review.

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[17] Although petitioner alludes to the constitutional restriction upon the rendering of advisory opinion (Br., p. 7), that restriction—implicit in the requirement of a case or controversy (U. S. Const. Art. III, § 2)—is plainly inapplicable in the instant case. This Court must decide the retroactivity issue in order to dispose of the proceedings at bar.

In the *Schooner Peggy* litigation, for example, subsequent to the lower court decision ordering that the schooner be forfeited to the United States as a lawful prize, this country had entered into a treaty with France which provided in part that any captured property not yet definitely condemned was to be restored. Chief Justice MARSHALL's opinion was phrased in terms of the obligation of an appellate court to apply the existing law where a case has not yet reached final judgment:

> "It is, in the general, true, that the province of an appellate court is only to inquire whether a judgment, when rendered, was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, and of that no doubt, in the present case, has been expressed, I know of no court which can contest its obligation. . . . [T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed, but in violation of law, the judgment must be set aside." *Id.* at 110.

The same reasoning which guided Chief Justice MARSHALL in the *Schooner Peggy* was subsequently applied by this Court in cases arising under the National Prohibition Act, where prosecutions begun under that Act were held to have been abated where final judgment had not yet been reached at the time the Twenty-first Amendment was ratified. *Chambers* v. *United States,* 291 U. S. 217 (1934); *Massey* v. *United States,* 291 U. S. 608 (1934). The principle was most recently applied by this Court in *Hamm* v. *City of Rock Hill,* —— U. S. ——, 85 S. Ct. 384 (1964), where the Civil Rights Act of 1964 was held to have abated convictions based upon state trespass statutes.

Although the dissenting justices in *Hamm* disagreed with the applicability of the principle of abatement to the judgments under review, both the majority opinion and the dissents proceeded on the theory that the question was limited to whether the Civil Rights Act of 1964 abated prosecutions where the judgments had not yet become final.

The language of these cases, carefully confining the application of new law to cases which have not yet reached final judgment, clearly implies that where a judgment has reached finality and cannot be said to be void *ab initio* it should not be upset. Indeed, a consideration of the principle applied in these cases indicates that the problem of "drawing lines" suggested by the dissent below (R. 271, 279-81) is not at all a difficult one. It is logical, in view of the well-warranted emphasis upon finality of judgments which has historically been a part of our legal system, to hold that a state conviction which had reached finality prior to the *Mapp* decision should not be open to collateral attack on habeas corpus.

Such a holding would be wholly consistent with this Court's consideration of the merits of search and seizure claims raised in state trials held prior to *Mapp* where the case reached the Court on direct review after *Mapp* was decided. See *Stoner* v. *California*, 376 U. S. 483 (1964); *Fahy* v. *Connecticut*, 375 U. S. 85 (1963); *Ker* v. *California*, 374 U. S. 23 (1963). Any such case could have been the vehicle for overruling *Wolf* v. *Colorado*, at least if sufficient objection had been made at trial to preserve the constitutional question for review, as was done in the *Stoner*, *Fahy* and *Ker* cases. See *United States ex rel. Linkletter* v. *Walker*, 323 F. 2d 11, 19 (5th Cir. 1963), *cert. granted* 377 U. S. 930 (1964) (No. 95, Oct. Term 1964); Bender, *The Retroactive Effect of an Overruling Constitutional Decision: Mapp* v. *Ohio*, 112 U. Pa. L. Rev. 650, 676-77 (1962).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Second Circuit should be affirmed.

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Respectfully submitted,

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